

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

TRANSCRIPT OF PROCEEDINGS

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IN RE: DIGITEK PRODUCT : CIVIL ACTION
LIABILITY LITIGATION : NO. 2:08-MD-01968
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November 20, 2009

MOTIONS HEARING

BEFORE THE HONORABLE JOSEPH R. GOODWIN
CHIEF UNITED STATES DISTRICT JUDGE
AND
THE HONORABLE MARY E. STANLEY
UNITED STATES MAGISTRATE JUDGE

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24 Proceedings recorded by mechanical stenography; transcript
produced by computer.

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1 PROCEEDINGS

2 JUDGE STANLEY: Good morning, everyone. I
3 understand that we have not been able to reach the gentleman
4 who wished to participate with respect to the Kathy
5 McCornack case. I understand he had requested, or was
6 interested in participating, Mr. Thompson.

7 MR. THOMPSON: Yes, Your Honor. He does not have
8 an active motion to be argued this morning, although he has
9 discovery issues that may be coming down the pike. So, he
10 was interested. I appreciate the Court's indulgence in
11 attempting to hook him up, but I think they've gone the
12 extra mile and have not been able to do that.

13 So, we're prepared to go forward and we'll just report
14 to Mr. Ernst. I think he'll probably call in on the
15 official number for the status hearing at 10:00, but I don't
16 think that we should give him another thought right now.

17 JUDGE STANLEY: Okay. I would be willing for
18 somebody to, you know, go out in the public space and keep
19 trying him and to interrupt the hearing if they want. But,
20 you know, since his motion is not ripe, I'm certainly
21 prepared to go forward.

22 All right. So, -- I'm sorry. Go ahead.

1 JUDGE STANLEY: And I'm ready right now.

2 MR. THOMPSON: Your Honor, I -- Jimmy Williamson
3 is the case attorney. He has the motion to compel. I
4 introduce him to the Court. This is his first time in this,
5 in this courtroom. He's from Houston, Texas.

6 JUDGE STANLEY: Well, we're very pleased to have
7 you, and I hope you like our accommodations and we're always
8 pleased to have visiting attorneys.

9 MR. WILLIAMSON: Thank you, Your Honor. Yes,
10 you've been very gracious, you and your staff.

11 JUDGE STANLEY: Excellent. All right. And we
12 have the usual suspects for the defense. Okay.

13 Now, I have read your materials and considered them,
14 and my first question, I guess -- and I'll direct this to
15 you, Mr. Williamson -- it would appear to me that your
16 requested depositions of the defense witnesses in this
17 particular, relating to this particular motion are tied in
18 to what you perceive as your burden of proof to establish
19 the elements of the cause of action. Is that correct?

20 MR. WILLIAMSON: That's correct, Your Honor.

21 JUDGE STANLEY: All right. Now, assuming that you
22 have to show causation and a chain and the wrongful conduct,
23 I, I have some difficulty understanding the significance of
24 topic 6 which is the business and financial arrangements,
25 agreements, and relationships that existed between Actavis

1 and Mylan relating to Digitek during 2006, 2007, and 2008.

2 If, if we are focusing on the quality of the product,
3 Digitek, I don't understand what Actavis and Mylan's
4 relationships relating to the product itself, what impact
5 that would have on your case.

6 MR. WILLIAMSON: My individual case, Your Honor,
7 number one, I was trying to inquire with that -- there's
8 actually a couple questions like that where I'm trying to
9 inquire about what financial arrange- -- my client, Mimi
10 Vega, received Digitek and has prescription records and
11 hospital records with all product ID.

12 She was in the hospital when she got a high digitalis
13 reading. And we have a board certified cardiologist who's
14 testified that her condition -- she had congenital heart
15 failure secondary to pregnancy. She had developed a heart
16 condition as a result of having a child, and she was stable
17 and doing well.

18 She went in the hospital and she kind of went off the
19 cliff, for lack of a better word. Her clinical course
20 deteriorated -- that was January, '08. Her clinical course
21 deteriorated so much she had to have an artificial pump put
22 in.

23 She was put on a heart transplant list. She eventually
24 had both her legs amputated. And she eventually dies in
25 September, '08, precipitated by her clinical course going

1 downhill in January, '08.

2 Her -- there's three sources of Digitek pills that she
3 was subject to. One of them was from St. Luke's Hospital
4 which is where she literally was an in-patient when she had
5 the high digitalis reading in January, '08.

6 And, so -- St. Luke's Hospital in Houston, Texas, is a
7 2000-bed hospital probably, or bigger, and it houses the
8 Texas Heart Institute which is the world's leading, one of
9 the world's leading centers. I think they've done more heart
10 transplants than anyone in the world. So, it's a place
11 where people with congenital heart failure are. There's
12 lots of heart cardiac patients in that facility.

13 To answer your -- now, with that preface, to answer
14 your question, I was trying to figure out what relationship
15 Mylan or Actavis had in terms of how those pills got to
16 Houston, Texas, in St. Luke's Hospital.

17 The Court is correct in saying that it's probably my
18 burden of proof to bring you that when -- but, by the way,
19 this is a trial case. It's on the trial docket. I am
20 hopeful Judge Goodwin or Judge Goodwin and you will make the
21 decision on what cases go.

22 JUDGE STANLEY: He will.

23 MR. WILLIAMSON: I'm hopeful this is -- if not the
24 first, I'm hopeful it is one of the first cases teed up.
25 So, it's not merely academic that I need to get this proved.

1 I was thinking one way to demonstrate how these pills
2 got to St. Luke's was to try to figure out -- follow the
3 money. What financial arrangements exist with St. Luke's,
4 what are the financial arrangements in terms of existing
5 with hospitals, how were they marketed to hospitals.

6 I, I will say this. If an error concession helps or
7 hurts me, I mean, I'm happy to forego the financial
8 arrangements, put that burden on Mr. Thompson and the PSC.
9 I'm afraid they might not do it for Texas or St. Luke's or,
10 or, or the Wal-Mart stores in Texas, which was another
11 source of my pills. I'm afraid they may be concentrated on
12 the national or global picture. My burden may be more, more
13 direct in Texas or St. Luke's or Houston. So -- or, or
14 Wal-Mart.

15 So, that was my, one avenue is to ask for the records.
16 One avenue is to follow the money. That's my rationale.

17 JUDGE STANLEY: Well, have you pursued asking the
18 defense for a stipulation as to who produced the pills that
19 she took? I mean, it's not clear to me what records there
20 would be as you follow the pills from the plant to the
21 patient; in other words, whether the batch numbers are
22 recorded in the pharmacy at the hospital, whether the batch
23 numbers are actually reported on the patient chart.

24 So, I -- you, I am sure, know far more about this than
25 I do, but --

1 MR. WILLIAMSON: I think -- I didn't mean to
2 interrupt the Court.

3 JUDGE STANLEY: You can see where I'm going.

4 MR. WILLIAMSON: I think I can.

5 JUDGE STANLEY: You have the right to discover and
6 to prove -- I mean, you must prove that, --

7 MR. WILLIAMSON: These are their pills.

8 JUDGE STANLEY: -- that they made the pills that
9 hurt your client. And I'm trying to figure out --

10 MR. WILLIAMSON: And I have to also prove that
11 there's something wrong with those pills, --

12 JUDGE STANLEY: Right.

13 MR. WILLIAMSON: -- which means I -- I mean, some
14 defect in the law.

15 JUDGE STANLEY: Right.

16 MR. WILLIAMSON: Okay. And the Court's correct.
17 And to do that, I need to identify -- my chain kind of
18 stops. My medical records do reflect Digitek, but they do
19 not reflect it -- I'm sorry. The St. Luke's Hospital
20 records do reflect Digitek, but they don't reflect
21 particular batch numbers or lot numbers.

22 The pharmacy records from Walgreens and Wal-Mart that I
23 have do reflect certain identification numbers. Okay? But
24 they don't give me further information.

25 Upon informal discussion with defense counsel, they

1 said, "Well, there's really no way to take that number,
2 Mr. Williamson, that you have in your possession and link it
3 up to any given batch." And I said, "Or at least not from
4 the information I --" I'll phrase it this way so I'll make
5 sure I'm being accurate with the Court because I don't want
6 to overstate something, especially on my first visit here.
7 I don't want to overstate it ever, especially on the first
8 visit.

9 But there's no way I can match my identification
10 numbers that I have on pharmacy records or hospital records
11 to, to take that back into Actavis batches. And as the
12 Court probably, I'm sure, is aware, Mylan takes the position
13 they didn't know anything about anything about any defect in
14 manufacturing. And, so -- and Actavis takes the position
15 they did not market to anybody other than Mylan, which we
16 can argue about how those defenses play later. But in my
17 case, I've got to start getting my pills back to an Actavis
18 batch that have problems.

19 JUDGE STANLEY: Right. Surely they must be able
20 to provide that information because otherwise you couldn't
21 have a recall letter, could you?

22 MR. WILLIAMSON: By the way, your actual pre-trial
23 order number 27 requires me to do what I just said and what
24 you just said; namely, that it's the Court's intention that
25 such plaintiffs should be able to trace backwards the lot

1 number of his prescription to the manufacturer of those
2 tablets. That's your order. Okay.

3 JUDGE STANLEY: And a well written one.

4 MR. WILLIAMSON: Absolutely. The -- and, so, I
5 personally think, and still think today, after looking at
6 all the paper, depositions is going to be the most efficient
7 way for me to figure out how to do this. Written discovery
8 is, has the potential to have carefully crafted legal
9 answers that are somewhat evasive, which is their job.
10 Please do not accept that as an attack on counsel. Counsel
11 is eminently qualified. But that's their job to be a
12 zealous advocate.

13 JUDGE STANLEY: Well, about the only thing I can
14 imagine in the way of written discovery that probably would
15 suffice would be an admission to a request for admissions
16 that basically is the same as a stipulation that they say,
17 "Yeah, they were our pills. We produced them. And they're
18 in this batch."

19 MR. WILLIAMSON: I'd have to -- I'm not being
20 difficult. I'd have to think about the wording of that to
21 make sure I've got what I need. But that might work, Your
22 Honor. But the Court does know I did send them
23 interrogatories and asked this question.

24 JUDGE STANLEY: Uh-huh.

25 MR. WILLIAMSON: I said, "Okay. What's your

1 arrangement with Wal-Mart stores?" They refused to answer.
2 "What's your arrangement with St. Luke's?" They say, "We
3 didn't sell directly to St. Luke's." I say, "Who did you
4 sell to?" so I can figure out what they told St. Luke's.

5 JUDGE STANLEY: Exactly. You can --

6 MR. WILLIAMSON: And they said -- and they refused
7 to answer.

8 JUDGE STANLEY: Okay.

9 MR. WILLIAMSON: And then when I asked for
10 marketing materials to St. Luke's Hospital, they say, "We
11 have none from January 1, '06, forward."

12 As I know the Court knows because you've been involved
13 in this litigation, digoxin is a generic drug that's been on
14 the market for many, many years. So, they could have
15 marketing materials that are directly relevant that pre-date
16 January 1st, 2006.

17 JUDGE STANLEY: Let me ask you this. Assuming
18 that we learn the other cases that are going to trial this
19 week, isn't every other plaintiff attorney who's got one of
20 those cases that's going to trial have the exact same
21 problem that you have?

22 MR. WILLIAMSON: We were discussing that this
23 morning. And it's my belief that, yes, they're going to
24 have the same burden. They're obviously going to have the
25 same burden of proof I have. But I think they're also going

1 to have some of these same issues that I'm raising with Your
2 Honor.

3 JUDGE STANLEY: Okay. So, is it fair to, for the
4 Court to think that, well, that these depositions should
5 relate to the trial cases and be done at one sitting with
6 all those plaintiffs' attorneys participating?

7 MR. WILLIAMSON: The, the answer to that, Your
8 Honor, is you're partially correct. Okay? It is -- it may
9 be true -- I don't know -- since I don't have access to
10 defense witnesses, I don't know the exact person who dealt
11 with St. Luke's Hospital and how my pills got to St. Luke's.

12 So, I'm somewhat at a loss to answer your question
13 because I don't have the information. It is possible that
14 that person may also be a person that the PSC is interested
15 in, and maybe even probable.

16 JUDGE STANLEY: Well, I'm not sure that it's a
17 question of the PSC. I mean, I'm talking about the actual
18 cases going to trial. I'm trying to differentiate between
19 the specific needs of a trial case --

20 MR. WILLIAMSON: Uh-huh.

21 JUDGE STANLEY: -- of showing the chain of the
22 pills from manufacturer to patient. And I'm also trying to
23 understand what plaintiffs in general need to know. It
24 strikes me that they could be different.

25 MR. WILLIAMSON: They -- the -- I'm not trying to

1 interrupt Fred, but -- Mr. Thompson. The -- what I need to
2 know, Your Honor, is not only do I need to prove that my
3 pill came out of this batch, I need the proof over what is
4 wrong.

5 And there are documents in my chain that may not apply
6 to all chains. I mean, now, since I don't have the benefit
7 of the information, I'm obviously seeking that discovery
8 literally. But, but -- so, the documents that relate to
9 Wal-Mart and the quality control problems that were related
10 to pills that were given to Wal-Mart, which is a huge retail
11 chain, obviously, and Walgreens and St. Luke's Hospital in
12 Houston, Texas, which are my three sources, may not apply,
13 and actually don't apply to all cases.

14 So -- but you're correct. There's going to be that
15 thread -- the thread that exists for me is also a specific
16 thread that is going to exist for each of the cases that
17 Judge Goodwin puts on the accelerated trial docket, you
18 know, the cases he advances for trial.

19 JUDGE STANLEY: Okay.

20 Now, Mr. Thompson, what did you want to say?

21 MR. THOMPSON: Your Honor, I was going to say this
22 will recur in any case that's brought forward to be tried,
23 but that recurring requirement does not make it a PSC
24 generalized inquiry. There's no way that I as a PSC would
25 probably ever track down the path of pills to St. Luke's

1 Hospital in Houston. It may well be that a single person or
2 a single 30(b)(6) would be sufficient.

3 I had a trial case and my client was in Bay City,
4 Michigan. There's another in San Luis Obispo, California.
5 It may be that a single person can provide that tracking
6 information, but I doubt it.

7 And, so, I believe this is simply going to be trial
8 specific discovery. There are only seven cases that are set
9 right now. And, so, this is -- I mean, this is the breaks.
10 This is, this is what lawsuits are. And I do think that the
11 theme that, that I want to make sure that we have in our
12 minds, and that is reciprocity.

13 We have been tendering our clients, our treating
14 physicians for depositions to prepare these cases to go
15 forward, and what we're seeking is limited and very direct
16 discovery on path, proof of usage, and the path of
17 distribution of these pills.

18 We have gotten a series of what I would call peekaboo
19 responses, one of which is: "Your questions are too late.
20 They should have been asked in June and they weren't." The
21 second one is: "Your questions are too early. They're
22 premature." The third is: "We don't know, we don't know
23 the path that the pills took. We can't answer that
24 question."

25 You know, the first two I don't think we need to worry

1 about because we're dealing with trial specific issues and,
2 of course, this is the time to do it. The last is something
3 that really does require an inquiry because if the answer of
4 the defendants is, "We don't know," or, "We can't tell you,"
5 then we really need to track that down.

6 There are some statutory requirements. There are
7 regulatory requirements. There are company requirements as
8 to tracing batches and lots. And if what they're really
9 saying is, "We don't know," well, that's a very important
10 part of liability that we need to track down as well.

11 But I do think that these all emanate from trial
12 specific needs and they're tailored narrowly to, to get
13 what's needed.

14 JUDGE STANLEY: Mr. Thompson, is -- if you look at
15 the seven topics that were in the notice, are any of these
16 topics things that, matters that the Plaintiffs' Steering
17 Committee wish to pursue as to every case?

18 I mean, I completely follow your argument with respect
19 to the chain of, and tracing of pills on trial specific
20 cases. But I'm wondering if there are topics that, about
21 the, the whole distribution system, the business and
22 financial relationships, the marketing, that the Plaintiffs'
23 Steering Committee wishes to pursue for all cases.

24 MR. THOMPSON: Judge, we -- the answer to that --
25 do you want me to go item by item?

1 JUDGE STANLEY: Yes.

2 MR. THOMPSON: But as a general response to your
3 question, I would certainly say that with regard to topic
4 number 2, with regard to topic number 3, adverse event
5 reports not limited to Ms. Vega --

6 JUDGE STANLEY: Well, of course.

7 MR. THOMPSON: -- are clearly already
8 contemplated, --

9 JUDGE STANLEY: Right.

10 MR. THOMPSON: -- and certainly topic number 5. I
11 believe that those are areas that are within the general
12 inquiry of the, of the PSC, yes, ma'am.

13 JUDGE STANLEY: Well, in other words, you're
14 saying in every single case every plaintiff wants to know
15 about marketing, sale, supply, adverse event reports, and
16 batch records. Is that what you're saying?

17 MR. THOMPSON: The -- topic 5 I think are the
18 business and financial arrangements. We already have access
19 to batch records.

20 JUDGE STANLEY: Yeah. Topic 6 is business and
21 financial arrangements. You may be looking at --

22 MR. THOMPSON: I'm looking at a different one.
23 I'm looking at one that has six topics.

24 JUDGE STANLEY: I'm looking at one with seven
25 topics.

1 MR. THOMPSON: The secret topic.

2 MR. WILLIAMSON: I think the seventh was the
3 financial arrangements if memory serves me.

4 JUDGE STANLEY: No. Topic 7 was the Actavis sales
5 representative with the most knowledge regarding Actavis'
6 sale, supply, marketing in or distribution of Digitek to
7 Mylan.

8 MR. WILLIAMSON: Correct.

9 JUDGE STANLEY: So, I am looking at the notice for
10 the 30(b)(6) deposition to Actavis which is --

11 MR. WILLIAMSON: I'm sorry, Your Honor. I was
12 looking at the one in Mylan.

13 JUDGE STANLEY: -- document number 24. Yeah,
14 Mr. Thompson is talking about Mylan. And, so, what I'm
15 trying to figure out is, are there overarching topics for a
16 30(b)(6) witness that are not individual trial specific?

17 MR. THOMPSON: Yes, Your Honor. In fact, we had
18 discussed that this morning that -- amongst the trial
19 counsel that a 30(b)(6) of the batch identification and the,
20 the procedures and the requirements that a 30(b)(6) was
21 needed, and that we were going to be moving for that both
22 for Actavis and for Mylan. So, yes, that specific topic is
23 one of generalized application.

24 JUDGE STANLEY: What other ones are?

25 MR. THOMPSON: Well, Judge, I think that the

1 distributors and purchasers, the --

2 JUDGE STANLEY: Let's go by topic numbers on the
3 Actavis one. Topic 1 is the distributors and purchasers in
4 general you said?

5 MR. THOMPSON: Yeah, in general. But, here again,
6 to the extent that that 30(b)(6) person is knowledgeable
7 about the individual facts, well, then, yes, the individual
8 case lawyers would want to participate in that as well. So,
9 "yes" on number one.

10 JUDGE STANLEY: Well, let me hear from the defense
11 for a while, but I may come back to you to see how we can
12 work this out.

13 Is it going to be Mr. Moriarty?

14 MR. MORIARTY: It is, Your Honor. Do you want me
15 to make a presentation or just answer your questions?

16 JUDGE STANLEY: Well, I'm sure you recognize that
17 the plaintiffs who are going to trial have the burden of
18 proof to establish that you've made a defective product that
19 got into their plant. How can that not be discoverable?

20 MR. MORIARTY: Okay. That's not the dispute here.
21 What we have told these lawyers in answers to
22 interrogatories more than once, and what I have told these
23 lawyers over the telephone, is that they are essentially
24 going about this the wrong way.

25 Actavis sells every last tablet of Digitek to Mylan.

1 Actavis has answered interrogatories and is prepared to put
2 up the company witnesses that Mr. Thompson has listed that
3 the PSC has asked for who will say that pursuant to the
4 supply and distribution agreement that has been produced,
5 that they sell every last Digitek tablet to Mylan. It's a
6 generic manufacturer.

7 They do not track tablets to Wal-Mart, to Texas, to
8 Houston, Texas, to a particular place in Houston, Texas.
9 Okay? We've told them that. So, Actavis has no witnesses,
10 has no documents. And that, that -- we answered those
11 interrogatories.

12 JUDGE STANLEY: So, you'll stipulate that you are
13 the producer of every Digitek tablet that came from Mylan.

14 MR. MORIARTY: If it's a Digitek tablet, yes.

15 So, the next phase is an inquiry to Mylan. What can
16 Mylan say about the distribution to Wal-Mart, to Texas, to
17 Houston, Texas, and to various stores?

18 I'm not going to speak for Mylan, but I will, I will
19 just turn this about. As I've told all these lawyers, the
20 place to start is at the bottom of the chain. Okay?

21 So, for example, in the Vega case that we're here about
22 right now, I have told Mr. Williamson and I have written to
23 Mr. Williamson saying we would like to take the deposition
24 of the hospital pharmacy at St. Luke's. We might find out
25 where they got their Digitek from, what distributor, what

1 sub distributor, what buying consortium. And then you can
2 trace it back eventually to, hopefully to a specific batch.

3 In the case of Mimi Rivera-Vega's out-patient tablets
4 which she got, I believe, at a Wal-Mart Pharmacy, it doesn't
5 matter. Substitute the name. For every one of these
6 lawyers, the inquiry will be the same. For Mr. Blizzard it
7 would be whatever Bonnie Kelch took.

8 We've got to go to her pharmacy, or you've got to go to
9 CVS or Wal-Mart and find out about their distribution
10 systems because all, all Mylan does is sell this to
11 Wal-Mart, for example, and deliver it to a Wal-Mart
12 distribution center.

13 The Mylan truck is not running around the 50 states
14 dropping tablets off to pharmacies. Wal-Mart has their own
15 distribution system. And how a tablet from a specific batch
16 gets from their loading dock to Mimi Rivera-Vega's hospital
17 tray is not something that these defendants know about, for
18 the most part, and have answered interrogatories to that
19 effect. So, --

20 JUDGE STANLEY: Just to reiterate, however, you
21 will stipulate that if Mylan distributed a Digitek tablet,
22 you produced it.

23 MR. MORIARTY: We manufactured it.

24 JUDGE STANLEY: Okay.

25 MR. MORIARTY: So, so, what I tried to do in this

1 whole process, the lead-up to today, which is a motion to
2 compel hearing, was to get the PSC, and Mr. Williamson
3 specifically, to communicate so that as I was trying to
4 communicate to them, the inquiry so far as what these
5 defendants really know is a PSC issue. They need to ask
6 Actavis or somebody from Mylan, "Okay. How far can you take
7 us down the chain?" And Actavis and Mylan -- and that's a
8 common inquiry in every case. Okay?

9 From there, it is a case specific issue for the lawyers
10 collectively to go through these pharmacy companies. And if
11 we have to create a new carve-out under PTO 16 specifically
12 for pharmacy chain depositions, we can do it. But I'm here
13 on a motion to compel hearing that should never have taken
14 place.

15 JUDGE STANLEY: All right.

16 Who wants to talk about Mylan?

17 MS. MCDONOUGH: Thank you, Your Honor.

18 Really, everything Mr. Moriarty said is true also of
19 Mylan and UDL. We were able to confirm, for example, that
20 we did not distribute any tablets directly to St. Luke's
21 Hospital.

22 We do distribute tablets to a national Wal-Mart
23 distribution center, but Mylan and UDL distribute to large
24 wholesalers, distributors, and re-distributors. And then we
25 don't know where they decide to send those lots and batches

1 from there.

2 And we've given a lot of documents already to the
3 plaintiffs that established that whole chain as far as Mylan
4 and UDL keeps track of that. But I do agree with Mr.
5 Moriarty that the next step is to find out -- if you know
6 the pharmacies that Ms. Vega went to, you subpoena them or
7 you ask them or have a third party request and say, "What
8 are your batch and lot numbers that would have applied to
9 her prescription?"

10 And then we can work together to see if they match up
11 somewhere on the chain. They may. They may not be the
12 right batch and lot numbers, but we can fill in those gaps.

13 But I do believe it's their burden to go from their
14 individual plaintiff up because we've gone from our
15 defendants down as far as we can go on that chain.

16 JUDGE STANLEY: To what extent has -- I mean, has
17 Mylan provided a list of the wholesalers that you sold
18 Digitek to?

19 MS. MCDONOUGH: We have. And we've supplied, you
20 know, batch and lot records as far as we can take them. And
21 we have confirmed, for example, that we haven't supplied to
22 specific entities that they've identified like St. Luke's.
23 Sometimes there are people farther along the chain that
24 might be supplied to, but that's not one of them.

25 With Wal-Mart we've given the records that show what

1 we've sent to the national Wal-Mart chain. And the next
2 step would be to ask the Wal-Mart national chain, "Where did
3 those tablets go because we've got a Wal-Mart pharmacy in
4 Houston? Just show us that."

5 So, I don't think it's a very complicated chain. But
6 the larger defendants, the producer and first distributor,
7 packager, Mylan, can only go so far on the chain because
8 these large wholesalers and distributors have their own
9 little system that we're not a part of.

10 JUDGE STANLEY: And are you willing to enter into
11 stipulations on behalf of Mylan establishing that Mylan
12 shipped batch X to a particular center or place?

13 MS. MCDONOUGH: Yes. And I think we've actually
14 already produced a pretty large volume of documents that
15 shows that, but we're happy to do that.

16 JUDGE STANLEY: Okay, all right.

17 MR. WILLIAMSON: May I respond, Your Honor?

18 JUDGE STANLEY: Okay. Now, you're responding just
19 in your individual case. Right, Mr. Williamson?

20 MR. WILLIAMSON: Yes, Your Honor.

21 JUDGE STANLEY: Okay.

22 MR. WILLIAMSON: First of all, they've said things
23 today they've never said to me. They literally didn't say
24 those things in interrogatory answers; namely, that they
25 only shipped to -- they refused to give me any information

1 on how they sold to Wal-Mart.

2 And even now with their comment, I still do not know
3 what arrangements they have with Wal-Mart regarding keeping
4 up with lot or batch numbers. And, quite frankly, it would
5 have been exceptionally easy for me to take two depositions
6 - one of Actavis and one of Mylan - in order to do this,
7 which I would still like to do in order to get that pinned
8 down on how they create their chain for my particular pills.

9 But, secondly, with regard to the St. Luke's pills
10 which happened -- by the way, she was in the hospital when
11 she got this high digitalis reading. So, she was getting
12 her pills from St. Luke's at that time.

13 They haven't explained how those pills -- they haven't
14 given me their sources of information over how pills ended
15 up in St. Luke's Hospital. I have no objection if they
16 want -- I've never objected to them going to St. Luke's and
17 starting to take depositions at St. Luke's Hospital in
18 Houston.

19 JUDGE STANLEY: I don't see it as their obligation
20 to tell you what you have to prove. I mean --

21 MR. WILLIAMSON: Right.

22 JUDGE STANLEY: In other words, you know, you can
23 go to St. Luke's and say, "Give me the batch -- tell me what
24 pills my client got."

25 MR. WILLIAMSON: Fair. That's true, Your Honor.

1 And it is also true that since it is my burden, I can
2 ask them what they know. And I have been -- I have not been
3 able to obtain that information. I did send written
4 interrogatories on this subject, and I was told they would
5 not answer any of them on an objection.

6 I did request -- for example, in Mylan on September 9th
7 I requested depositions. They never responded. They didn't
8 even respond by saying, "We're not going to give you
9 depositions." Mylan never responded to me on my request for
10 depositions at all.

11 I sent a second letter, and they did not respond to
12 that. I filed a notice. They did not respond to that. I
13 filed the motion.

14 In the meantime, I sent interrogatories. Quite
15 frankly -- I'm trying to make sure I don't put on my
16 advocacy hat but, quite frankly, I could have made one plane
17 trip, taken two depositions in one day, and avoided a stack
18 of paper about as big as my arm, as well as this hearing.

19 I would still request the right to do it. I certainly
20 appreciate the Court's efforts at getting a stipulation on
21 the chain of custody. I'm not being naive. But I would
22 still request to hear what the defendants say about how
23 their pills got to Houston, Texas.

24 JUDGE STANLEY: Mr. Thompson, have you given some
25 thought as to plaintiffs in general versus trial plaintiffs?

1 MR. THOMPSON: Judge, yes, I have. The -- if we
2 listen to the two entities today, they actually gave you two
3 very different answers. I believe Actavis said they don't
4 track, or they can't tell you where the batches, the
5 individual batches went, simply that all the pills they made
6 went to Mylan.

7 Mylan says that they know where the batches are, but
8 they have no idea what happened after they sold them.
9 There's certainly information that's available to that.

10 The, the recall letters, the letters that individuals
11 received didn't materialize out of thin air. The batches
12 are required to be maintained. The batches are required to
13 be followed, the lot numbers through the path of
14 distribution.

15 And for the defendants simply to say, "We're going
16 to -- we suggest that you try to start climbing this hill
17 from the bottom up and that's the only way to do it," that's
18 not right.

19 The, the batches can be traced from the point of
20 origin. And the reluctance of the defendants to do that is,
21 is, is a reluctance borne I suggest not of impossibility,
22 but simply of a desire to push the, push, push the discovery
23 burden that is theirs to produce information that's known to
24 them, to simply push that onto the, to the plaintiff to
25 wander around trying to find it out.

1 JUDGE STANLEY: Why, why would Mylan have
2 information on Wal-Mart's distribution practices?

3 MR. WILLIAMSON: Because -- may I supplement that,
4 Judge? I think Mr. Blizzard may be the right person to ask
5 that question to because there are a ton of regulatory
6 requirements about how you trace and keep up with
7 prescription drugs. And, quite frankly, I think he's more
8 familiar with that aspect of it than I am.

9 JUDGE STANLEY: Well, it seems to me when you've
10 got an independent third party, then the person with the
11 burden of proof should go to the independent third party to
12 find out what information they have about the case.

13 MR. WILLIAMSON: But -- may I respectfully
14 supplement that comment, Your Honor, that there's nothing
15 wrong with going to the independent third party, but I
16 should also be able to go directly to the horse's mouth,
17 namely the defendant, and say, "What information do you have
18 about how your pills got to Houston, Texas?"

19 Even -- for that matter, even if their answer is, "We
20 have no information whatsoever," I guess that could be their
21 answer. I really -- I will say, given the federal
22 regulatory scheme regarding tracking, I find it very
23 difficult to believe that that will be the answer, that, "We
24 have no earthly idea whether our pills end up in Houston,
25 Texas, or not." I really find that difficult to believe

1 that will be their sworn answer under oath.

2 MR. THOMPSON: Well, Judge, let me -- I'll just
3 briefly respond. If that is a complete response to our
4 inquiry -- if the answer is, "We do not know what happened
5 to the pills after they left our control," if that is a
6 complete response and it's forwarded to us in that form,
7 then we will start climbing the mountain from the bottom up.

8 But if it turns out that that information is known to,
9 that that information is known, then we will be back in
10 front of you with that information.

11 MR. WILLIAMSON: For example, as Mr. Bell just
12 handed me a note suggesting, you know, if there's some
13 agreement in place between Wal-Mart -- what agreements are
14 in place between Little Rock where Wal-Mart's stationed and
15 Mylan in regard to keeping up with that tracking and tracing
16 data? I don't -- Mylan can answer that question in one
17 deposition for me.

18 Now, my interest is Houston, Texas. I mean, I'm trying
19 to make sure I stay focused there so I don't intrude upon
20 your province for managing the entire litigation.

21 JUDGE STANLEY: Right.

22 MR. WILLIAMSON: But how those pills get to
23 Houston is, is a question they can answer, and how those
24 pills get to Wal-Mart and how they get to St. Luke's. Even
25 if they didn't directly sell them to St. Luke's, they

1 probably know how they got there.

2 JUDGE STANLEY: We are past the time for Judge
3 Goodwin to come on the bench. So, let me find out if the
4 defense has anything more you want to say about this.

5 MR. MORIARTY: I do.

6 Mr. Williamson has said he could have taken care of
7 this with a couple of depositions. The problem when you
8 read all the exhibits to this is that these are the very
9 same depositions the PSC has asked for.

10 So, in trying to coordinate the PSC with Mr. Williamson
11 and do what all the foundational orders in this case want,
12 including the *Manual for Complex Litigation* is to avoid
13 duplicate depositions, that's what we were trying to
14 coordinate. To turn this into a motion to compel is
15 inappropriate.

16 Now, the recall letters -- I would find it stunning if
17 a plaintiff's lawyer could produce to us a recall letter on
18 Mylan or Actavis letterhead. They would probably notice
19 that their recall letters came on Wal-Mart stationery or CVS
20 Caremark stationery because CVS Caremark knows who their
21 customers are. Mylan and Actavis do not know who the
22 customers of those pharmacies are.

23 And, finally, Interrogatory Number 1. Now, maybe Mr.
24 Williamson was not referring to Actavis when he said "they."
25 "Please state whether you sold or supplied any Digitek to

1 St. Luke's from January 1, 2006, through April 25th, 2008,
2 and, if so, the lot, batch, or NDC numbers."

3 Our answer: "No, Actavis Totowa did not sell or
4 distribute Digitek to health care providers, retailers,
5 hospitals or consumers."

6 I've told this story dozens of times to dozens of
7 plaintiffs' lawyers.

8 MS. MCDONOUGH: Your Honor, just very briefly, a
9 couple of quick things.

10 The regulatory requirement is that anyone in the supply
11 chain know who their predecessor is and their successor.
12 They do not have an obligation currently under the
13 regulatory scheme to know every successor, successor,
14 successor.

15 So, we do have the records that show we get product
16 from Actavis and who we distribute it to. And those have
17 been produced.

18 I think the disconnect here is the order and the manner
19 in which the discovery was propounded. First, we get an
20 informal letter on September 9th asking about this. And we
21 responded that we do not distribute directly to St. Luke's
22 or to ultimate pharmacies.

23 Then there was written discovery on October 2nd with
24 the interrogatories, requests for admissions, and RFPs. We
25 responded to those timely, and to this day still have not

1 gotten any response saying there was any deficiency in those
2 productions. But only a few days after the written
3 discovery was the 30(b)(6) notice filed which was largely
4 duplicative of the documents and responses that we were
5 already preparing for the written discovery.

6 And then only a week after that, the motion to compel
7 was filed without, you know, any deficiencies being noted,
8 again prematurely.

9 So, all of this has kind of come at a strange juncture.
10 But then on October 21st we first got these objections to
11 the notice, and then here we are.

12 But I think what's happened is that this has not gone
13 in the right order. I suspect many of the answers to these
14 questions are in the documents that have been produced.

15 And I also think this may be inappropriately an attempt
16 to shift their burden of establishing their chain onto us.
17 And we really can't do that, nor would it be proper for us
18 to do that.

19 JUDGE STANLEY: Thank you.

20 MR. WILLIAMSON: The timing, Judge, is a result
21 of -- I'm under deadlines to finish my discovery.

22 JUDGE STANLEY: I know you are. And, of course,
23 deadlines keep shifting.

24 Are we ready for Judge Goodwin?

25 MR. MORIARTY: Yes, Your Honor.

1 (Pause)

2 JUDGE GOODWIN: Good morning, everyone. Good
3 morning to those who have joined us by conference call.
4 This is Judge Goodwin. I'm here with Judge Stanley. We're
5 going to start at the top of the agenda, which is the
6 confirmation of the new deadlines.

7 Do the parties have anything to say about that?

8 I -- yes.

9 MR. THOMPSON: Judge, I will point out that the
10 one area that we were not able to agree on is actually
11 represented, I believe, by the topic number 6, the class
12 action briefing. So, the deadlines are comprehensive except
13 for that issue.

14 JUDGE GOODWIN: The deadlines look fine to me.
15 I'll deal with the class action stuff as a separate agenda
16 item.

17 The -- I would note that Judge Moats, Judge Moss, Judge
18 Martinotti, and Judge Hahn have all been contacted and we're
19 setting up a conference call with them and with Kim Fields
20 and with Judge Stanley within the next 10 days. Probably
21 it's going to be after Thanksgiving now. We're going to
22 talk about joint briefing schedules and a joint *Daubert*
23 hearing.

24 If I am correct, and counsel can tell me that if I am,
25 that Judge Moss is the only state judge so far that has

1 issued a detailed scheduling order for discovery and trial.

2 MR. DEAN: You're absolutely correct, Your Honor.

3 Maybe Mr. Moriarty wants to correct me on that.

4 MR. MORIARTY: There is one in West Virginia that
5 tracks the MDL, and we are -- I think we're in the
6 process -- I'm sorry, Your Honor. I've got paper all over
7 my lap.

8 JUDGE GOODWIN: That's all right.

9 MR. MORIARTY: We're in the process of submitting
10 a revision of that which tracks, I think it's PTO 45,
11 whatever the new revisions to the MDL dates are.

12 JUDGE GOODWIN: All right. Thank you.

13 Anything else on the new deadlines?

14 The trial selection process and some of the ancillary
15 issues, I understood since we were going to talk about this
16 some time ago that we're going to deal with this today and
17 counsel are prepared to go forward on that. Is that right?

18 MR. THOMPSON: Your Honor, I have in the courtroom
19 with me, if I could take a moment to introduce several
20 people.

21 JUDGE GOODWIN: Yes.

22 MR. THOMPSON: There are several attorneys who
23 have cases on the, for nomination. And at the appropriate
24 time, if you desire, they're certainly available to answer
25 any questions that the bench may have.

1 Mr. Williamson is here, Jimmy Williamson. Edward
2 Blizzard is present.

3 MR. BLIZZARD: Good morning, Your Honor.

4 MR. THOMPSON: Shamus Mulderig is here. Don
5 Ledgard is here. Don Ernst is a California attorney, and my
6 understanding is he's participating by telephone. I had
7 admonished everybody not to talk. But, Don, if you're --

8 JUDGE GOODWIN: Mr. Ernst, are you there?

9 MR. ERNST: Good morning, Your Honor. I am.

10 JUDGE GOODWIN: Nice to have you with us.

11 MR. ERNST: I wish I could be there in person. I
12 apologize, Your Honor.

13 JUDGE GOODWIN: I'm glad to have you here in
14 virtual reality.

15 MR. THOMPSON: And, of course, we have -- of
16 course, we have a case ourselves at Motley Rice.

17 I believe Cayce Peterson is also on the telephone who
18 has one of the cases to be reviewed.

19 Your Honor, we're certainly at your pleasure as to --
20 we've submitted some information. I know that the
21 defendants have forwarded some information to the, to the
22 Court. The -- we're certainly -- it's one of those things
23 where you almost feel as though you should not advocate a
24 batting order. And, so, we are at your pleasure, any
25 questions that you may have with regard to the cases.

1 I know that I have several attorneys who are ready and
2 eager to be the first case. If you wanted that information,
3 we could certainly forward that to you.

4 One of the issues that -- I don't know if you're going
5 to address it. Maybe I should sit back and wait to see if
6 you address it. But one of the issues, of course, is the
7 *Lexicon* and the trial forum, the physical location of the
8 trial.

9 These cases are four plaintiffs from several different
10 areas in the country. And certainly our perspective is that
11 if this Court wants to pick a case that, wants to pick a
12 case, we are certainly going to conform to the Court's
13 desire. If you want us to waive that *Lexicon*, we certainly
14 will.

15 JUDGE GOODWIN: Well, that will be, that will be
16 something we have to do if we're going to do these benchmark
17 cases. We're either going to have to waive it or I'm going
18 to have to go to the trouble, which I can do, of getting the
19 chief judges of the circuits to designate me to go down
20 there, get it transferred to me, and go to some other state
21 and hear the case which, which I, which I can do. And I'd
22 prefer not to travel all over the country to hear these
23 cases. I prefer to follow Judge Fallon's lead and see if we
24 can't get them here mostly.

25 MR. THOMPSON: Well, now, Judge, a couple of these

1 cases are in places that when I heard about it, I said, you
2 know, we may have a situation where the judge maybe wants to
3 go. Apparently, one is a courthouse at Yosemite Valley in
4 California. When I saw that, I said maybe I should advocate
5 that one. Anyway, thank you.

6 JUDGE GOODWIN: In the pre-trial orders I
7 anticipated that you were perfectly entitled to advocate for
8 any particular case out of what was at that time thought to
9 be ten, but now it's seven, and for the order in which you
10 want to try them for that matter. I am, pursuant to the
11 earlier orders, going to reduce it to five and I will set a
12 trial order.

13 But as I understand it, Mr. Moriarty has a, has a
14 presentation he wishes to make. But I wanted to give you a
15 chance to go first, if you wanted to, with regard to any
16 preferences and reasons for your preferences.

17 MR. THOMPSON: Judge, I -- this is one of these
18 times where I should have showed up with plan B and I should
19 have been better prepared.

20 JUDGE GOODWIN: I have your, I have your letter.

21 MR. THOMPSON: And we have set out in the letter
22 the basic facts. If the Court would find it convenient for
23 us to project a trial order and to rank them, I really would
24 request that you give me a short opportunity to confer with
25 my trial counsel to make sure that I have, if not consensus,

1 at least general agreement amongst ourselves. And I
2 apologize. That's, like I say, --

3 JUDGE GOODWIN: I'll be happy to do that.

4 I'm glad, Mr. Thompson, that you were able to get some help
5 today and bring these fine lawyers in to help you.

6 MR. THOMPSON: Well, as a matter of fact, now that
7 I'm standing here, I should sit down and not say another
8 word. I should just let these guys come and carry the ball
9 for me.

10 JUDGE GOODWIN: Thank you. Actually, I understand
11 we have visual aids. Is that right?

12 MR. MORIARTY: We do.

13 JUDGE GOODWIN: All right.

14 MR. MORIARTY: If they work. It's always a
15 challenge.

16 As you said, there are seven cases remaining; five from
17 the plaintiffs, two from us. The question is whether they
18 are all representative.

19 JUDGE GOODWIN: Let me interrupt you. I think
20 there's a problem with that, with them being representative.
21 I do. With the number of death cases we have, with the
22 product ID, I see the problems involved. Nevertheless,
23 these are the cases that were selected.

24 To the extent -- and I'm just adding something here.
25 To the extent that defense counsel chose the cases that fell

1 out because they didn't have merit, you proved that point.
2 That is proved just as well as if you took it to trial and
3 got a verdict. So, to that extent, they're representative
4 of the cases that are no good.

5 I, I'm not, I'm not going to interrupt your
6 presentation anymore. I'm just telling you I do appreciate
7 the problems that I'm left with with the seven I've got to
8 choose from.

9 MR. MORIARTY: All right. I have hard copies of
10 this. If you wanted to take notes directly on it, I'm happy
11 to give that to you.

12 JUDGE GOODWIN: To the extent I ever take notes, I
13 will.

14 MR. MORIARTY: So, let's get to the basic --

15 JUDGE GOODWIN: One last interruption and then I
16 won't do it anymore.

17 Gentlemen, benches in the courtroom are hard. You're
18 welcome to come sit in the jury box.

19 Kim, you're welcome to come up and sit in a soft chair
20 as well. That includes you, Mr. Tiano. You were a member
21 of the bar last time I checked.

22 All right, I'll try to restrain myself.

23 MR. MORIARTY: So, we have looked at the *Annotated*
24 *Manual for Complex Litigation*, several cases, and some
25 treatises. And, and here are some words that jump out.

1 JUDGE GOODWIN: Go ahead.

2 MR. MORIARTY: Representative, typical, the case
3 should have an ascertainment function for settlement
4 purposes or to answer troubling questions that are common to
5 a universe, accurately inform future trends, avoid trying
6 anomalous cases, and archetype. Those are really what the
7 standards are.

8 But I actually kind of like -- I'll get to it in a
9 minute how the plaintiffs feel about this. These are the
10 four cases --

11 JUDGE GOODWIN: The people on the phone can't hear
12 the attorneys. Would you pull that microphone in front of
13 you a little closer. Is it turned on as well?

14 MR. MORIARTY: I don't know the answer to this,
15 Your Honor.

16 JUDGE GOODWIN: Yes, it is.

17 MR. MORIARTY: Okay. So, there are four cases
18 that we think among this group of seven are representative
19 and can go in the trial group.

20 One is the Young case from North Carolina; the Luce
21 case, which is Mr. Thompson's case; the Klopping case, which
22 I believe is Mr. Ledgard's case; and the Gilmore case. And,
23 you know, why. Geography. They're diverse.

24 We've got somebody -- you know, you've got the extreme
25 ranges of age here; somebody in their 40s, 60s, 70s, 80s.

1 We've got -- you know, because of the way the group got
2 reduced from ten to seven, we do have sort of an overlay in
3 death. So, we have a personal injury case in here.

4 And then as far as elevated levels and clinical
5 diagnoses is concerned, those are now things that have
6 started to rise into a higher frequency.

7 Not on this schedule is the diseases that these people
8 had. We've got Young who was an atrial fibrillation only
9 patient. You've got Ms. Luce who was a congestive heart
10 failure only patient. And then Klopping and Gilmore had a
11 little bit of each. So, you have some disease spread among
12 these.

13 And then: Is there any special problem with the case
14 that would disqualify it? And the answer in each is "no."

15 In the Young case, it's sort of typical of the vague
16 comorbidities that a number of people have that I tried to
17 point out on July 22nd when I was here with our
18 presentation. And it's also a transient injury case,
19 obviously, because it didn't lead to death.

20 So, the patient had an elevated level for a few days,
21 and then moves on and doesn't have long -- at least from our
22 view of the case, doesn't have long-term impact, which is
23 representative of a substantial part of the docket here.

24 The Luce case also has both doses, the .125 and the
25 .250, at different times in her medication history. And

1 it's an excellent representative example of the renal
2 disease issue that I talked about as predominating
3 throughout the docket back at the July 22nd hearing.

4 The Klopping case also has both doses, the .125 and the
5 .250. And, of course, he's unlike somebody like Ms.
6 Gilmore. Mr. Klopping is a substantially younger patient
7 with a lot of comorbidities.

8 And although, you know, there aren't a lot of people in
9 their 40s with as many comorbidities as he has, people in
10 their 50s with those comorbidities, so he's representative
11 of that classification.

12 And then Ms. Gilmore is -- you know, you might think
13 that she's 83. How many of those are there? Surprisingly,
14 there are a substantial number of patients in their 80s in
15 the docket. She's representative of that group, multiple
16 comorbidities. And she also has the renal disease issue
17 that is very important throughout these cases.

18 So, which three do we think should be knocked out? Two
19 of them are not representative for various reasons, and one
20 is deficient. And just so Mr. Blizzard knows, the
21 deficiency is not his problem. It is a problem beyond the
22 control of the lawyers. That's the Kelch case.

23 So, here's Mr. Thompson explaining what he thinks in
24 July is what a representative case should be and not be.
25 And he was talking about one of our defense selections at

1 the time, but he made some excellent comments which apply
2 today. And it was a case with a very sharp credibility
3 dispute between what a doctor said in the records and what
4 the patient was going to testify to.

5 And, so, he uses the language: "That is a very
6 interesting factual departure. Who's telling the truth? Is
7 it the medical record or is it the patient? However the
8 jury answers that question doesn't push the litigation down
9 the road."

10 It harkens back to the slide I had up earlier with the
11 standards where it's sort of a, you know, an interesting
12 factual question, but doesn't serve to inform future trends.
13 It's a confounder. It's a side issue. But, unfortunately,
14 it's not going to help value cases. And that's what we have
15 here in two of them.

16 This is a slide that I used in July. This is the exact
17 same slide except I highlighted the McCornack and
18 Rivera-Vega cases in red on this slide because back at
19 pages, you know, a number of pages in the transcript -- I
20 looked these up -- we objected to these two cases for a
21 number of reasons at the time because they were procedurally
22 deficient. Those have become not procedurally deficient,
23 but they have shown themselves to be not representative.

24 And, in fact, at Pages 10 to 12 of that transcript when
25 Mr. Thompson was urging these cases be brought to the Court,

1 he wasn't urging them as representative cases of the docket.
2 He was singing the praises of the lawyers who I have come to
3 know as quality lawyers. So, he was singing their praises
4 with the reason for their lawyerly skills, but not for the
5 representation of these cases.

6 So, why, in our view, is the Vega case not typical?

7 As far as this docket is concerned, she is at the
8 extreme end of the young range. She has a heart disease
9 that is very atypical of this. As Mr. Williamson mentioned,
10 it's called peripartum cardiomyopathy. It is pregnancy
11 induced.

12 So, women who get this disease -- and it's very rare.
13 One in 4,000 or more could have it. It's quite serious and
14 it has a high fatality rate.

15 At the time of the incidents that lead us to this
16 lawsuit, she was in what her doctor calls bridge to
17 transplant therapy. In other words, he was, through medical
18 management and surgical management, preparing her for a
19 heart transplant.

20 He had counseled her heavily to lose weight. She
21 couldn't. So, she had bariatric surgery in order to qualify
22 for the transplant list. She was on home IV therapy with
23 drugs to control her heart failure, her heart rate. And
24 then ultimately she gets this LVAD, left ventricular assist
25 device, in the key time period that the case has to do with.

1 The medical records have no contemporaneous recorded
2 suspicion or diagnosis of digoxin toxicity, the records all
3 these famous doctors in Houston wrote at the time, not a
4 single one of them. And the two key levels were 1.2 which
5 are well within the lab parameters of almost every lab in
6 the country of .8 to 2. And, in fact, those are the lab
7 parameters at St. Luke's.

8 The death certificate which was written five months
9 after the recall is silent on digoxin issues. But during
10 his deposition, Mrs. Vega's treating cardiologist
11 retrospectively recognizes some signal arising out of these
12 1.2 levels in a period of time when he recognized no
13 problem, and then blamed defective Digitek for Mrs. Vega's
14 death.

15 Serious, serious credibility issue ringing back to Mr.
16 Thompson's comments, interesting case to try; certainly high
17 stakes because her medical bills probably exceed a million
18 dollars, but not exactly representative on archetype or
19 informing of future trends that would advance this
20 litigation to some resolution beyond slugging them out
21 one-on-one in the courtroom.

22 Then we get to the McCornack case. This is Mr. Ernst's
23 case. It's a sudden death case, no medical care for months
24 prior to the death. Why is that different? Why is it
25 atypical?

1 Because in almost every case that I've looked at, if
2 not every case, we have medical records in the days and
3 weeks preceding the patient's adverse outcome, whatever that
4 may be, which people can rely on. This is absolutely
5 sudden, out of the blue, middle of the night, no medical
6 care prior to death.

7 Their entire case, I might say, in our estimation is
8 founded on this post-mortem digoxin blood sample. I don't
9 need to get into the scientific controversy surrounding
10 post-mortem levels at this point. It's a very serious
11 issue. But I can say that there are few, if not any, other
12 cases that I'm aware of in the MDL that have post-mortem
13 blood levels.

14 So, the coroner sent the blood sample to his chosen
15 laboratory within days of Mr. McCornack's death. He
16 selected that laboratory because they have a heavyweight
17 reputation. He drafted an autopsy and a death certificate
18 within a month or so of Mr. McCornack's death, and ascribes
19 the whole thing to natural causes, arrhythmia in the middle
20 of the night, and sent the blood sample back in June of 2008
21 with this 3.6 blood level.

22 And what happens after that? Plaintiff's counsel
23 retains Dr. Mason as an expert witness in May of this year,
24 about a year after the death certificate. We deposed the
25 NMS laboratories that Dr. Mason thought so highly of, and

1 questioned extensively about the significance and
2 reliability of a 3.6 in predicting backwards what the level
3 was at the time of the death because this is such an
4 important issue.

5 And then days later, virtually went from Philadelphia
6 to San Jose, California, to depose this coroner. And what
7 am I greeted with when I walk in the door but an amended
8 death certificate and autopsy 18 months after the death, 15
9 months after he's got these results, and he changes the
10 diagnosis to be digoxin related death -- okay -- five
11 minutes before the deposition is to begin.

12 He, when I questioned him, knew nothing about what his
13 own chosen laboratory forensic toxicologist said about the
14 reliability of that level. And he puts all of his eggs in
15 that particular basket to prove their case.

16 So, serious, serious credibility issues that we don't
17 think inform future trends or mean anything to the overall
18 docket in this case. This is an anomalous case that should
19 not be in the first group.

20 And then why is, why is Kelch deficient? There have
21 been a number of delays getting deposition dates, locating
22 witnesses, producing records. We have found new things all
23 along the way. And that leads up to a reason to defer this
24 case.

25 And in looking back at the July 22nd transcript, there

1 was an extensive back and forth about whether cases that
2 were then deficient would be brought up to speed, and what
3 would happen to those cases if they weren't ready and we
4 didn't have all the things. And it was clear from Your
5 Honors that those cases were going to drop off and be put in
6 the second group.

7 Just a few weeks ago there was a deposition where at
8 some point around the time of the deposition they found two
9 new volumes of the Mammoth Hospital charts that had been
10 stored at an off-site facility.

11 They postponed the deposition. One of my colleagues
12 and Mr. Blizzard were out in California. They postponed
13 this deposition until January to deal with the fact that
14 they had these new records.

15 Just two days ago we got -- we're trying to compare
16 page by page how many new records. It's somewhere between
17 529 and 694 new pages just of hospital records in that case
18 two days ago.

19 We are still waiting for depositions of one of the
20 sons, one of the treating pulmonologists, a pharmacist. A
21 Dr. Prothro is difficult to find. There are additional
22 physician and billing details. There is a dispute over the
23 existence of family notes.

24 The plaintiffs -- a doctor said, "I was shown family
25 notes." Plaintiffs contend there are no such family notes.

1 They think it was an emergency room note. We think there
2 may be family notes. So, we're having a tussle over that.

3 We have found new providers. A recently deposed doctor
4 said, "Oh, yeah, there was another cardiologist in some
5 other city in Nevada or northern California." We're trying
6 to track those down.

7 And I think when you start adding these things up,
8 every time you get new records, every time you get a new
9 provider, it opens the door for there being even more things
10 to find.

11 This is actually a rather medically perplexing case.
12 So, having all the records and all these depositions is
13 quite important, which leads me back to this slide.

14 Young, Luce. I think Young is Mr. Mulderig's case if
15 I'm not mistaken. He's here today. Luce is Fred's case.
16 Klopping, as I said, is Mr. Ledgard's case. And the Gilmore
17 case, I'm sorry, I don't recall.

18 MR. LEDGARD: That is my case, Gilmore.

19 MR. MORIARTY: Oh, Gilmore is yours and Klopping?

20 MR. LEDGARD: Not Klopping.

21 MR. MORIARTY: Okay. I'm sorry. I flip-flopped
22 those.

23 MR. ERNST: Lambert & Nelson represents
24 Mr. Klopping, not Mr. Ledgard.

25 MR. MORIARTY: Okay. I'm sorry. I flip-flopped

1 those. Mr. Ledgard is the Gilmore case. These are the
2 cases that we think are the most representative. I guess if
3 Mr. Thompson advocates for his case to come to the top, it's
4 very hard for me to prioritize these. I would probably put
5 Klopping ahead of Gilmore. But as to the plaintiffs' two
6 selections, I'm not even going to try to rank them. I'm
7 happy to answer any questions about any of these cases or
8 the legal standards for representative.

9 JUDGE GOODWIN: Just a comment. I'm going to have
10 Mr. Thompson respond and then go back to you.

11 The entire process was designed to have counsel choose
12 a group of cases which on each side they thought would meet
13 the criteria from the manual and from our earlier
14 discussions. It really does us no good to try cases that
15 are not meaningful to both sides. It really does very
16 little good. All it means is we'll try more cases until we
17 finally get enough tried that somebody gets an idea what's
18 going on.

19 So, what I'm trying to do is try the first batch of
20 five and do as well as I can to inform plaintiffs' counsel
21 throughout the country and defense counsel as to what these
22 cases are about. And I think that's what we've known all
23 along was the purpose of the exercise.

24 And I emphasize again, I absolutely enjoy trying cases.
25 I'm happy to start and I'll keep trying them as long as you

1 want me to. And I will, to the best of my ability,
2 encourage and beg, if necessary, that each of the cases be
3 transferred to me, that I be transferred to that district
4 for the purpose of trying a case. And I'll try it and move
5 on to the next one.

6 And however long it takes, that's how long I'll do it.
7 I have no problem with that. I like to travel. I don't
8 mind hotel rooms. So, whatever it takes, that's what we're
9 going to do.

10 Mr. Thompson.

11 MR. THOMPSON: Your Honor, just let me start by
12 saying that to the extent that Mr. Moriarty's presentation
13 identified the most dynamic plaintiffs' lawyers, my feelings
14 are hurt that he's forwarded me as the case that probably
15 ought to go first. So, my feelings are, are actually kind
16 of, kind of hurt.

17 But the -- one of the slides that he produced was the
18 slide from July where we did indicate that one of the
19 factors that should be part of the Court's thought process
20 is the zealous representation. I would say that certainly
21 the Kelch case with Ed Blizzard, that laundry list of, of
22 deficiencies, if we think through what PTO 16 calls for, we
23 are in the process of something called basic fact discovery
24 which the, the, the PTO actually calls it the plaintiff and
25 treating physicians, which gives us a thumbnail of the case

1 sufficient to pick the active trial cases. And then at that
2 point, there is anticipated to be a discovery period. And
3 the trial date for this case is actually January of 2011.

4 So, it's difficult to talk about a case where there's
5 been a little bit of difficulty getting some hospital
6 records impacting a trial date of January of 2011.

7 And let me say that -- certainly, Mr. Blizzard can
8 speak for himself as to, to the, the weight that ought to be
9 given to these deficiencies, but we actually view the Kelch
10 case as a very evocative case.

11 And the reason for that is that really, although the
12 facts from case to case will vary, and although the, the
13 impairments of the person are very important because you
14 don't take Digitek -- you don't take digoxin unless you have
15 an underlying health condition that requires it.

16 And, so, the range of ages -- we embrace the health
17 difficulties that people have because to the extent that you
18 lack a residual reserve, the brittleness of the dosage
19 becomes much more tenuous, and you are impacted by
20 variations much more than somebody who is very vigorous and
21 may have residuals.

22 So, we embrace the age. We embrace the underlying
23 disease process. Those are people who use digoxin. And,
24 so, that's part of the process.

25 I will say that -- and, here again, let me reserve the

1 opportunity to consult with my trial attorneys to make sure
2 that I don't cross them by giving you a proposed order of
3 cases. But I do believe that three cases that Mr. Moriarty
4 has pointed out, the common thread that they share is that
5 each of those cases has a very vigorous, very highly
6 motivated, and very excellent attorney who is going to put
7 forward the case in the strongest terms.

8 And now I finally remember my point that I got off of.
9 My point is that the key question in this case is: Can the
10 plaintiff prove that a digoxin pill that varied from, from,
11 that was defective in a legal sense, can they prove that
12 that defective pill reached the plaintiff, and that the
13 defect was of such a quality and nature that it most
14 probably or more probably than not or, or was a substantial
15 contributing factor.

16 I mean, we can go from state to state picking out the
17 legal standard, but did that pill contribute to the injury
18 in a, in a legal sense. And every one of these cases has
19 that issue tied up in it.

20 And my suggestion is that if we're going to take three
21 to four weeks of the Court's time -- well, it's not, but it
22 could be. If we're going to take two to three weeks of the
23 Court's time to, and the judicial resources to put a case in
24 front of it, it ought to be a case that's worthy of the
25 expenditure of effort.

1 And, so, I don't think that the cases that are being
2 pointed out, particularly the Vega case and the McCornack
3 case, I don't think that those should be ruled out simply
4 because the, the claimant, the plaintiff has a major health
5 defect or a major situation.

6 The cases -- the key question to be answered is: Can
7 the plaintiff convince the jury that a defective pill was
8 ingested and caused the health defect that we claim. And
9 that is a common question through all seven of these cases.

10 Now, we do have a pecking order. I would -- and I
11 don't want to belabor the point. I would like a short
12 opportunity to -- you know, unlike the defendants, I have a
13 very unruly crowd over here and I need to make sure that I,
14 I'm square with them.

15 JUDGE GOODWIN: Mr. Thompson, we'll take a
16 15-minute break, allow everybody a chance to relax, and you
17 can confer with your co-counsel. Then you can finish your
18 remarks.

19 Court will stand in recess for 15 minutes.

20 (Recess taken from 11:05 a.m. until 11:25 a.m.)

21 JUDGE GOODWIN: All right, Mr. Thompson.

22 MR. THOMPSON: Just very briefly at the outset,
23 let me respond specifically to your request that we rank
24 our, the seven cases.

25 We rank them, number one, McCornack; number two, Vega;

1 number three, Kelch; number four, Luce; number five,
2 Gilmore; number six, Young; and number seven, Klopping.

3 I have several attorneys who traveled a distance and
4 who are intimately familiar with some of the facts in the
5 case and some of the issues that were raised by Mr. Moriarty
6 in his presentation, and I specifically would like to ask
7 the Court's indulgence to hear briefly from Mr. Blizzard
8 with regard to the Kelch case if that's okay.

9 JUDGE GOODWIN: That's all right. Yes, that's
10 okay. Yes, sir.

11 MR. BLIZZARD: Good morning, Your Honor.

12 JUDGE GOODWIN: Good morning.

13 MR. BLIZZARD: Should I speak from the podium?

14 JUDGE GOODWIN: If you like, whatever is
15 convenient for you.

16 MR. BLIZZARD: Your Honor, my name is Ed Blizzard.
17 I'm a lawyer from Houston and --

18 JUDGE GOODWIN: Do you have any trouble coming to
19 West Virginia to try your case?

20 MR. BLIZZARD: I do not. I do not, Your Honor.

21 JUDGE GOODWIN: All right.

22 MR. BLIZZARD: And I -- Mr. Thompson has been very
23 kind in his discussion by saying that I'm a zealous
24 advocate, but I'm going to start out by disproving that
25 because --

1 JUDGE GOODWIN: Can the people on the phones hear
2 the lawyers?

3 MR. ERNST: Yes, Your Honor.

4 JUDGE GOODWIN: All right. Mr. Blizzard, go
5 ahead.

6 MR. BLIZZARD: I just want to start out with an
7 admission. Bonnie Kelch's case is not a perfect case. And,
8 so, the phrase that's rattling around in my head is: Be
9 careful what you ask for. They've -- because you might just
10 get it. You know, they've asked that my case be put off.
11 It's not perfect, but it's a good case and I think it's
12 representative.

13 The Kelch family is who I represent. Bonnie died
14 February 25th of 2007. She did -- she lived in Mammoth,
15 California, with her husband who she was married to for 58
16 years, and they have five adult children.

17 She went into the hospital in January of 2007 with a GI
18 bleed. She had pre-existing atrial fibrillation. And she
19 was treated while she was in the hospital with digoxin, not
20 Digitek, the Digitek brand, but digoxin.

When she was discharged from the hospital, she was stable and her renal function was normal. She had been treated in the hospital with another drug that can interact with digoxin and raise the digoxin level. It was called Amiodarone.

1 JUDGE GOODWIN: We're having some problems with
2 noise on the phones. I don't know if any of the lawyers can
3 be of assistance to me in that regard.

4 MR. DEAN: Your Honor, you might ask them to put
5 their phones on mute.

6 JUDGE GOODWIN: If you could put your phones on
7 mute so that we can't hear your end of it, I would
8 appreciate it.

9 Go ahead, Mr. Blizzard.

10 MR. BLIZZARD: Okay. So, however, during the
11 hospitalization, her levels of digoxin were within the
12 therapeutic range, which is from .8 to 2.0. And, so,
13 everything was normal until she was discharged from the
14 hospital and she began taking Digitek.

15 She began taking Digitek immediately after her
16 discharge from the hospital on February 9th. And when she
17 returned to the hospital on February 21st, her Digitek level
18 was a staggering 9.6. And she died two days -- she died on
19 the 25th. I'm sorry. I misstated that. She came back to
20 the hospital on, I believe on the 23rd. She died two days
21 later from multiple organ failure.

22 Her physicians, the ER physician there and the treating
23 cardiologist have both been deposed. And both say that they
24 believe that digoxin toxicity was a substantial contributing
25 factor to her death. That's also confirmed by the medical

1 records that were prepared at the time, as well as the death
2 certificate has digoxin toxicity as a substantial
3 contributing factor to death.

4 Ms. Kelch -- here's some of the imperfections. She
5 wasn't in perfect health. She had congestive heart failure.
6 She had coronary artery disease. She had past experiences
7 with TIAs. And there are some -- you know, the defense has
8 taken the position that she didn't actually die from digoxin
9 toxicity, but she died from DVT.

10 So, there are defense medical arguments. We actually
11 have a very good expert, one of the renown, world renown
12 cardiologists, Dr. Zipes, who will be our expert in the
13 case. And we also have several treating physicians who
14 support our position that Ms. Kelch's death was caused by a
15 bad pill and digoxin toxicity.

16 So, that's a brief summary of our case, Your Honor. If
17 you have any questions of me, I'd be happy to answer them if
18 I have the information. And if I don't have the
19 information, I'll be able to get it for the Court.

20 JUDGE GOODWIN: Thank you, Mr. Blizzard.

21 MR. BLIZZARD: Thank you.

22 JUDGE STANLEY: I had one question for Mr.
23 Blizzard.

24 JUDGE GOODWIN: I'm sorry.

25 JUDGE STANLEY: The letter on Mr. Thompson's

1 stationery dated November 17th which discusses this case --

2 MR. BLIZZARD: Yes.

3 JUDGE STANLEY: -- says that she filled a
4 prescription at Rite-Aid, and that the pharmacy records
5 confirm that that Rite-Aid prescription was part of the
6 recall.

7 MR. BLIZZARD: Yes.

8 JUDGE STANLEY: But it's not clear to me whether
9 the Digitek that she took after she got out, is that what
10 you're speaking of?

11 MR. BLIZZARD: Yes. She, she went to Rite-Aid
12 following her discharge from the hospital and received
13 Digitek which was part of the national recall. We have the
14 NDC numbers.

15 Now, we have some of the same tracing issues that were
16 discussed earlier with Your Honor that we've, we've sent
17 interrogatories to them. And we've had the same discussion
18 with Mr. Moriarty about trying to actually trace it back to
19 a particular batch and lot.

20 JUDGE STANLEY: So, she got some Digitek in the
21 hospital that was not part of the recall, and she got some
22 digoxin from Rite-Aid that was part of the recall.

23 MR. BLIZZARD: Actually, Your Honor, not quite.
24 She received some other digoxin. It wasn't the Digitek
25 brand. Digoxin is -- or digitalis, as it's sometimes

1 called, is made by several different manufacturers. She did
2 not receive Digitek made by Actavis and distributed by Mylan
3 until after her discharge from the hospital.

4 JUDGE STANLEY: Okay. Thank you.

5 MR. BLIZZARD: Thank you, Your Honor.

6 JUDGE GOODWIN: Mr. Thompson.

7 I'm sorry. Yes, sir.

8 MR. WILLIAMSON: May it please the Court, I'm
9 Jimmy Williamson. I have the Vega case. I'm the lead
10 counsel in Vega. I would request just a couple of seconds
11 to talk about it.

12 JUDGE GOODWIN: Absolutely.

13 MR. WILLIAMSON: Thank you, Your Honor.

14 Your Honor, like Mr. Blizzard, Vega is not a perfect
15 case. Unlike Mr. Blizzard, I apparently have never had a
16 perfect case. I guess Mr. Blizzard has.

17 So, Mimi was a wife and a mother. She led an
18 unremarkable life. She had one child. When she got that
19 child, she got postpartum cardiomyopathy and had congestive
20 heart failure.

21 That -- other than the fact that that's very
22 sympathetic, of course, that heart failure doesn't get
23 treated any differently than any other heart failure which,
24 of course, would be true for and representative of many
25 people who take digoxin and many people who took Digitek.

1 She was 35 years old in January of '08. She is taking
2 Digitek. We do have a tracking and tracing issue over that
3 issue in terms of where it came from, which is part of the
4 hearing we had this morning. But sometime in January, '08,
5 she kind of clinically fell off the cliff.

6 Even though Mimi was in line for a heart transplant,
7 her cardiologist has said she merely did not have the
8 reservoir of strength to withstand the insult that she got
9 in January of '08.

10 Her levels of digoxin are, are lower than perhaps some
11 of these others. For example, I noticed Ed talked about
12 9.6. And Mimi's levels were lower than that, but I think
13 they're affiliated with increased morbidity and mortality.

14 Her problem was that her reservoir of resilience was
15 pretty small. And, so, when she got that insult, she went
16 on a downward spiral that was truly horrific. She
17 eventually had an artificial pump placed in her heart. She
18 eventually had to have both her legs amputated in order to
19 improve cardiac function. And she eventually dies in
20 September, '08, from congestive heart failure.

21 But, of course, the question becomes: What brought on
22 that? And my cardiologist and the doctors at the Texas
23 Heart Institute in Houston I believe are going to support
24 the fact that it was brought on by the digoxin insult.

25 JUDGE GOODWIN: Mr. Moriarty makes an issue of the

1 post-mortem levels and says that takes it outside the
2 typical case and doesn't inform, inform as much as to
3 typical issues.

4 MR. WILLIAMSON: I don't think that applies to my
5 case, Judge, because Mimi actually -- because of the
6 extraordinary efforts of the Heart Institute, she suffered
7 the insult in January, but she doesn't actually die until
8 September. So --

9 JUDGE GOODWIN: So, he was talking about
10 McCornack?

11 MR. WILLIAMSON: Correct. I believe that's
12 correct, Your Honor.

13 JUDGE GOODWIN: Okay.

14 MR. WILLIAMSON: That's the general gist of it.

15 So, like all cases, she's representative in some ways.
16 She's not representative perfectly in every way. But
17 certainly we are ready -- we're happy to come to West
18 Virginia and try the case. And we're happy to defer to the
19 Court's ruling. And we're happy -- like all plaintiffs, we
20 want to go to trial as soon as we can, but we understand the
21 Court's process.

22 JUDGE GOODWIN: Anybody else?

23 MR. THOMPSON: Judge, on behalf of Luce, I'll
24 stand on my, my pleadings.

25 JUDGE GOODWIN: All right.

1 Mr. Moriarty, you may close.

2 MR. THOMPSON: Judge, those are the -- those are
3 our proposed order. Thank you.

4 JUDGE GOODWIN: All right.

5 MR. MORIARTY: Your Honor, I don't have any
6 comments about any of the cases. I've made my points on
7 that.

8 JUDGE GOODWIN: All right. Do you want to write
9 briefs or do you want me just to go ahead and tell you what
10 five cases we're going to do in what order? I know I've got
11 until December 21st, but I can make the decision today.

12 MR. THOMPSON: Judge, you know, sometimes you'd
13 like to at least get home before the Court rules,
14 particularly where the outcome is in doubt, but certainly
15 we're at your pleasure.

16 JUDGE GOODWIN: You know, I've worked at a law
17 firm where the partners were known to let associates wait
18 for jury verdicts. I understand all that.

19 MR. MORIARTY: And sometimes people traveling home
20 want to have something interesting to talk about. So, we
21 certainly don't want to file anymore briefs.

22 JUDGE GOODWIN: All right. I'm going to -- these
23 are the five cases in this order: Kelch number one; Young
24 number two; Luce number three; Klopping number four, Vega
25 number five. The rest of them will fall to the second

1 group. I hope that made you both equally unhappy.

2 As I understand it, our first trial is set sometime in
3 January next year. Is that right?

4 MR. MORIARTY: I believe it's January, 2011.

5 JUDGE GOODWIN: 2011. We've got plenty of time to
6 get these cases ready. That's why I wasn't too concerned
7 about your discovery issues. And also I'm going to leave
8 that to Judge Stanley.

9 But let me just say this. And this is more to the
10 plaintiffs than it is to the defendants. The plaintiffs
11 have the burden of proof. That means they have the burden
12 of going and digging out the stuff and getting the stuff
13 they need for discovery.

14 The defendants have an obligation under the rules to
15 respond fully and properly, but it is the plaintiffs' burden
16 to prove their case. That's, I'm sure, something very new.
17 I'll -- let's see what else I had on my schedule.

18 State case coordination. I talked about that a little
19 bit. I'm going to have to wait until my conference call to
20 tell you more about that. Again, I think that with the
21 state judges that we have involved, we're going to be able
22 to stay on a pretty coordinated path. Everybody's been in
23 the mood to do that up till now. I haven't seen anything to
24 the contrary.

25 I certainly had a nice long visit, as did Judge

1 Stanley, with Judge Moss. And even though she's entered a
2 scheduling order that has some dates that are slightly
3 different, I think we can work all of those out. I will be
4 communicating with them right away to let them know the five
5 cases and the order in which they're to be tried.

6 I'll just have to bring you up-to-date. When we set
7 the dates for the next series of conferences, I'll try to,
8 by the next conference, be able to bring you up-to-date on
9 our federal-state cooperation. I expect it to be excellent.
10 It has been so far.

11 Rule 11 motion status and relationship to the Lone Pine
12 issue. I don't know who put that on the docket, but whoever
13 did can talk about it.

14 MR. DEAN: I'm guilty, Your Honor. I put it on
15 the agenda.

16 JUDGE GOODWIN: All right.

17 MR. DEAN: And I have a, just a few comments.

18 In PTO 43 the Court said that the plaintiffs -- that
19 the Lone Pine motion is taken under advisement pending
20 completion of the basic fact discovery in the group one
21 cases, which we are nearing that point.

22 And, so, I don't -- I'll not rehash the briefs here.
23 That's not my purpose because I do want to tell you about
24 some things in regard to Rule 11 motions in relation to the
25 Lone Pine issue, some themes that are in the brief and some

1 facts that you would not otherwise be aware of.

2 You will recall the dialogue and the discussion we had
3 about use of Rule 11 or summary judgment motions or Lone
4 Pine orders in order to get rid of cases that were wholly
5 without merit. We have -- the defendants have filed and
6 submitted under the safe harbor provisions of Rule 11 two
7 Rule 11 motions as to which the time has come and passed.

8 And in one of those cases, the Collier (phonetic) case,
9 the plaintiff's lawyer in that case agreed to dismiss the
10 case, dismissed it with prejudice.

11 And the other case where we submitted a Rule 11 motion
12 where the time has passed is the Hebert case. And there is
13 a pending, pending motion before the Court in the Hebert
14 case in regard to the conditions of dismissal.

15 The plaintiff's attorney in that case wants the
16 dismissal to be in such a manner as he can refile the case
17 in any court. And the defendants would like for the
18 dismissal without prejudice to require refiling in this
19 court for all the reasons we've put in our briefs.

20 I think that the plaintiff's response time to the
21 briefs on this issue passed yesterday. And I -- obviously,
22 I haven't seen what may have been filed this morning. But I
23 think that's ripe and appropriate for your decision when you
24 get around to looking at it.

25 What I would like to also tell you is that we filed an

1 additional nine Rule 11 motions under the safe harbor
2 provision where the 21 days has not yet expired. But,
3 frankly, given what's in those motions, I would expect those
4 plaintiffs' lawyers to call up and agree to dismiss those
5 cases.

6 So, does Rule 11 work to get rid of these cases?

7 JUDGE GOODWIN: Apparently so.

8 MR. DEAN: The answer is, yes, it does work. But
9 it's also, Your Honor, true that it is a very costly
10 procedure to undertake because we have to go out and obtain
11 the records and have them reviewed by medical doctors and
12 sign affidavits.

13 So, the defendants are right now in the posture of
14 disproving the allegations about a basic element which is:
15 Is there any evidence of digoxin toxicity that a responsible
16 plaintiff's attorney should satisfy himself or herself of
17 before they even file a lawsuit.

18 Now, in our --

19 JUDGE GOODWIN: Well, of course, there's -- I'm
20 not going to go too far afield here. But, of course, that's
21 part of the Rule 11 remedy. If you have been put to
22 additional expense to have to do this because they've
23 brought a frivolous action, then sanctions can be imposed by
24 the Court.

25 MR. DEAN: And if they would fight me on the Rule

1 11, I could get that relief. But they won't fight me on the
2 Rule 11, so I can't get the relief you just suggested. So,
3 the --

4 JUDGE GOODWIN: Oh, I'm not so sure of that.

5 MR. DEAN: Well, I -- well, I'll have my people
6 research more, but that's what they tell me, that if they,
7 if they agree to dismiss, that I'm not entitled to come back
8 and get sanctions against them. But if you're willing to
9 entertain that motion, I'll research harder.

10 JUDGE GOODWIN: Well, research harder
11 because I'm of the view that somebody -- let's suppose
12 that there is somebody out there that in bad faith brings
13 a frivolous lawsuit with no foundation in fact whatsoever,
14 and then only when they're caught red-handed, dismisses
15 it. They should be sanctioned. So, take a further look at
16 it.

17 MR. DEAN: Okay. But I -- we have represented to
18 you in the, in the, in our papers a key fact. And that key
19 fact has not been disputed in the plaintiffs' opposition
20 papers.

21 And that key fact is that over half of the cases
22 pending on this docket do not have the basic element of any
23 proof at all of digoxin toxicity. So, what is the most
24 efficient way to deal with that?

25 Do we have to go out and obtain the records in 250

1 cases, look at them, get a doctor to sign an affidavit, file
2 our papers under the safe harbor provision, and then have
3 the cases dismissed, or is it more efficient for you to put
4 out an order simply requiring the plaintiffs' lawyers to
5 prove that there is a good faith basis for them to go
6 forward?

7 JUDGE GOODWIN: I've looked at your, at your
8 briefs, and the Lone Pine issue is one that I'll write an
9 order, memorandum opinion on.

10 I would note for you that most of the cases that
11 you-all have talked about in this Lone Pine context have
12 been cases where there are multiple defendants and we're
13 trying to sort out who's, who did what to whom. This isn't
14 such a case.

15 I also have a big thick book on Rule 11 sanctions. And
16 I think Rule 11 is an under-used rule. And I think that I
17 have no hesitancy, nor do I believe we would get anywhere
18 near the number of 200 where you could bring such motions
19 and they were justified and I ruled on them. I don't think
20 you'll get to 200.

21 Anyway, I'm going to look at your briefs and I'll rule
22 on it.

23 MR. DEAN: Thank you, Your Honor.

24 THE COURT: Anything else on Rule 11?

25 Yes, sir.

1 MR. THOMPSON: Your Honor, I do want to respond
2 just briefly.

3 JUDGE GOODWIN: Sure.

4 MR. THOMPSON: I know that you've already made
5 your position and your thoughts and your feelings very
6 clear, and we have communicated to the plaintiffs. I do
7 want to make two points.

8 JUDGE GOODWIN: I have absolute full confidence
9 that lead counsel for the plaintiffs have communicated the
10 Court's statements faithfully. And as I made clear in a
11 couple of writings at some point, individual plaintiffs'
12 lawyers still have a very large responsibility. Just
13 because we have coordination with lead counsel doesn't mean
14 that their responsibilities have ended.

15 MR. THOMPSON: My only two points are, number one,
16 we do not agree that a finding of digoxin toxicity is an
17 essential element of proving our injury. And, so, we resist
18 Mr. Dean's statement that that's a requirement. We think
19 that -- so, I do say that.

20 Secondly -- and, here again, I'm talking about
21 sausage-making to a certain degree. And, that is, that the
22 decision to file or not to file in a specific court is
23 oftentimes a, a multi-faceted decision.

24 And I would want this court -- as we have proselytized
25 to the plaintiffs' bar, we have worked very hard to make

1 this court the center of the universe on this, in this case.
2 And we've done that with New Jersey. Many of those cases
3 have been dismissed and have been allowed to be refiled only
4 in this court. We've gone to various places and
5 proselytized that this court is the proper center of the
6 universe. And I, I want this -- well, that's --

7 JUDGE GOODWIN: I understand what you're saying.

8 MR. THOMPSON: Yes, sir.

9 JUDGE GOODWIN: And one of the big advantages of
10 Federal Court as opposed to many forums is you have my full
11 attention, and we will move the cases as fast as the lawyers
12 want to move them and they will go to trial.

13 For whatever reason, State Courts are a lot busier
14 generally than Federal Courts, and we can devote more
15 attention. We have more resources a lot of times that we
16 can devote to cases like this.

17 I don't start out with any -- I actually start out with
18 the presumption that lawyers are ethical, smart, take good
19 cases, and file only those cases they believe have merit. I
20 start out with that bias in mind.

21 So, I don't start with a view that people are just
22 filing a bunch of frivolous lawsuits to see if they can jump
23 aboard the train. I don't mean to convey in any way to any
24 of the lawyers that I have any thought like that in my mind.

25 But I do want to emphasize again that each

1 representative of each client has duties to the Court in
2 this case. And they don't all fall on your shoulders. I
3 don't, I don't think, I don't think, I don't think there's
4 anything unclear.

5 I'm simply saying we've got to follow the rules. And
6 if there are Rule 11 violations, I will take appropriate
7 action. But I don't assume or presume or start out with a
8 mind-set that thinks that way.

9 Let's look at the class action briefing status. That's
10 kind of got dropped off my radar. Tell me about that.

11 MR. THOMPSON: Your Honor, we had several class
12 action attorneys on behalf of the PSC. There was an
13 allowance for class action certification discovery.

14 JUDGE GOODWIN: We've had about six weeks since
15 the deadline first went away.

16 MR. THOMPSON: Yes, sir. That discovery was
17 propounded. It was objected to and, in fact, was put before
18 Magistrate Judge Stanley for decision. We sought a stay of
19 the deadline for class action briefing pending her decision
20 on that. And our expectation was that we would receive some
21 additional information.

22 Magistrate Stanley issued her ruling, I believe, last
23 Friday - Thursday, Friday. It was shortly ago. And at that
24 point, although her order does not dissolve the stay,
25 certainly it, she's ruled. And, so, we're before you

1 seeking a new date for the class certification briefing.

2 We can file a motion to reset the briefing which, as
3 you recall at the beginning, we, we had reached substantial
4 agreement on every, moving every deadline except for this
5 one.

6 I'm here today to seek the Court's -- I'm here today to
7 ask the Court to set the deadline for times shortly after,
8 after the holiday season. I would like to have 60 days.
9 And that is for two reasons, one of which is that I am
10 purring a series of cats with the class committee. We have
11 gone from state to state -- and I think Magistrate Stanley
12 has seen this. We've gone from state to state and, in
13 essence, counseled many of the personal injury class
14 complaints and gotten them to withdraw the class complaint
15 aspect of it.

16 And, so, we've done a substantial amount of work in, in
17 cleaning that up and creating a situation where we're
18 dealing solely with economic consumer type issues. But it
19 would be very helpful to us to set that deadline shortly
20 after the holiday season.

21 I know that the defendants have taken the position that
22 they believe this should be moved along and should be
23 forthwith, and I'll let them speak for themselves. But our
24 position -- our perspective is that we request until just
25 after the holiday season, Your Honor.

1 JUDGE GOODWIN: I think I understand the
2 defendants' arguments, but I'll hear them. They've had six
3 weeks.

4 MR. MORIARTY: If they are telling us all in so
5 many words that they are not appealing Judge Stanley's
6 ruling on the motion to compel, then I think the stay can be
7 immediately lifted.

8 We have no objection to 60 days so that everybody can
9 have a reasonable holiday. And then whatever time period
10 the defendants are allowed following their deadline is,
11 should be the same as we've already implemented in the
12 previous orders.

13 I would --

14 JUDGE GOODWIN: Why don't I wait and see if they
15 object to Judge Stanley's order.

16 MR. THOMPSON: I'll tell you the answer to that.
17 Your Honor, quite frankly, we knew that we could simply
18 continue the stay in place by taking exception to the report
19 of Magistrate Stanley, and we elected not to burden the
20 Court with that.

21 We think that the most expeditious way is simply to
22 request the Court give us some time to file a single omnibus
23 brief with individualized sections for the, the
24 individualized actions. And we thought that that was the
25 most efficient use of the Court's time.

1 So, the answer is, no, we're not going to appeal, or
2 not appeal but object.

3 JUDGE GOODWIN: Sounds to me like we have
4 agreement.

5 Sixty days from now. Right, Mr. Thompson? I'm sorry.
6 How much time do you need after that?

7 MR. THOMPSON: I'm sorry, Your Honor.

8 JUDGE GOODWIN: Sixty days from now? Is that what
9 you want?

10 MR. THOMPSON: Yes, Your Honor. Thank you.

11 THE COURT: Mr. Moriarty.

12 MR. MORIARTY: My little deadline crib sheet does
13 not have the class action, but I think it was 30 days. It
14 was 30 days. That's fine with us.

15 JUDGE GOODWIN: All right.

16 MS. MCDONOUGH: No objection from Mylan either.

17 JUDGE GOODWIN: All right. Good. I keep
18 forgetting about you --

19 MS. MCDONOUGH: Yeah, I know.

20 JUDGE GOODWIN: -- which is probably a good thing,
21 isn't it.

22 MR. MORIARTY: I was sent on a very clear mission
23 by our class action people. I heard Mr. Thompson say a
24 single omnibus brief. Can we get some direction on page
25 count? Because a single omnibus brief on the many things --

1 JUDGE GOODWIN: Write all you -- this is going to
2 just sweeten your holidays. Write as long as you want.
3 Write all you want. Knock yourself out.

4 MR. MORIARTY: Okay.

5 MR. THOMPSON: Judge, I'm probably going to run
6 out of gas after a few pages, but these guys --

7 JUDGE GOODWIN: I understand. I didn't say I was
8 going to read all of it.

9 Can I digress for a moment to tell all these very
10 experienced lawyers what happened when a guy that had been
11 trying lawsuits for 25 years went on the bench and started
12 reading briefs. I thought and called one of my former
13 partners and said, "Stop. We've been doing it wrong for 25
14 years."

15 Because, you know, the judges know what the summary
16 judgment standards are. And they don't like that part at
17 the end where it says "for the foregoing reasons" if we
18 don't know what those are either. So, if somewhere in the
19 first page or two you could say what you want and why you
20 think you're entitled to it, it's very helpful. And almost
21 no one does that. Just put it right up front.

22 And if you can't say in a page what you want, or two
23 pages what you want and why you're entitled to it, you
24 haven't thought it through. Anyway, that's a digression.

25 I, I don't mean to insult anybody by saying that, but

1 since it apparently hadn't got through my thick skull in 25
2 years of litigating, I thought maybe at least one of you on
3 the phone or somebody here might not have thought that
4 through.

5 The next issue is docket maintenance issues. There are
6 four class actions. We've talked about that. I guess
7 that's all going to be a part of your resolution of this
8 issue.

9 The defendants cancelled depositions on those based on
10 the representation they would be dropped. So far, nothing
11 has happened. Am I right on that?

12 MR. MORIARTY: That's my memory. And I think
13 we've encouraged certain plaintiffs' lawyers, and I think
14 even the Court has reached out on occasion to get those
15 lawyers to act as promised. And I'm just -- I'm sorry, I'm
16 not prepared to address the specifics.

17 JUDGE GOODWIN: All right. Well, that is my
18 understanding of what was to be done. If it hasn't been
19 done, somebody file a paper and tell me.

20 I have the Ortra Wayne Davis case. There's a motion to
21 withdraw in that case. Is plaintiff's counsel on the line?

22 MR. MULDERIG: Plaintiff's counsel is here, Shamus
23 Mulderig.

24 JUDGE GOODWIN: It's nice to have you here.

25 MR. MULDERIG: Nice to be here.

1 JUDGE GOODWIN: Would you briefly for the record
2 just give me the background.

3 MR. MULDERIG: Sure. Ortra Wayne Davis was our
4 client by retainer contract, and we subsequently filed a
5 complaint on his behalf.

6 After we filed the complaint and in our representing
7 and dealing with Mr. Davis continued, we found that at one
8 point that the relationship between us and Mr. Davis had
9 broken down to such an extent that we could not effectively
10 represent him further in this litigation.

11 We contacted him via several modes of communication; by
12 calling him, by sending him certified letters, by attempting
13 to e-mail relatives, all to, to no end.

14 At this point, since we have made the motion to
15 withdraw, we've not even heard from Mr. Davis despite our
16 attempts as directed by the Court to contact him and to see
17 if he has another lawyer, if he will agree for us to
18 withdraw, or if he wants to proceed pro se. We simply do
19 not know what his choice is because he refuses to
20 communicate back with us.

21 That being said, we would like to reinforce our motion
22 to withdraw. And we believe the Court has, has the
23 appropriate paperwork to make a decision on that.

24 JUDGE GOODWIN: I may have heard from your former
25 client, which I'm going to now grant your motion, since you

1 have. He has responded to the Court that he will proceed
2 pro se. And that letter may not have even been filed in the
3 Clerk's Office as yet.

4 He advises the Court in the letter that he doesn't hear
5 well, has a number of health problems, can't talk on the
6 phone. It probably is going to involve a process whereby --
7 it's going to involve a motion process before something else
8 happens in the case. But you are relieved. You're welcome
9 to stick around or you're welcome to catch an early plane.

10 MR. MULDERIG: I'll stick around considering I
11 represent the Young family as well which was just selected
12 for the trial selection.

13 JUDGE GOODWIN: All right.

14 Next -- is Mr. Goldstein on the phone?

15 MR. WILLIAMS: Your Honor, this is Mike Williams
16 in place of Mr. Goldstein.

17 JUDGE GOODWIN: Okay. Welcome, Mr. Williams. How
18 are you?

19 MR. WILLIAMS: Doing fine, Your Honor. Yourself?

20 JUDGE GOODWIN: Fine. After considerable delay
21 and a lengthy process of deficiency letters, I've received
22 about 22 proposed dismissal orders in the case. You've --
23 you have filed just recently a belated response in each
24 case. And by belated, I mean very belated.

25 I could hear argument on this, but what I'm going to do

1 is I'm going to give you five days to correct any
2 deficiencies that there may be - and it's up to you to
3 figure out if there are or not - and file them. After that
4 time, the defendants may move to dismiss, and I will act on
5 the motions. It's apparent to me from just looking at it
6 that there may be some deficiencies.

7 You've got five more days, Mr. Williams, and then we'll
8 act on it. Okay?

9 MR. WILLIAMS: Yes, Your Honor. Thank you.

10 JUDGE GOODWIN: All right. What's good for a next
11 status conference? Does counsel for Mylan have a
12 suggestion?

13 MS. MCDONOUGH: I think I saw some proposed dates,
14 and I don't think it will be a problem. If I can't cover
15 it, Mr. Kaplan can. So, I'm willing to go with the
16 consensus.

17 JUDGE GOODWIN: Okay.

18 MS. MCDONOUGH: Thanks for asking.

19 JUDGE GOODWIN: Anybody have a suggestion?

20 MR. BELL: Judge, we have -- Mr. Frankovitch has a
21 conflict the first of February. I think other than that,
22 he's available with the consensus, whatever we reach.

23 MR. MORIARTY: And, Your Honor, --

24 JUDGE GOODWIN: Yes, sir.

25 MR. MORIARTY: -- for what it's worth, I'm

1 supposed to start a trial in State Court in Ohio on
2 February 1st. So, it can either be set and somebody can
3 cover for me, or we can set it closer to mid February, --

4 JUDGE GOODWIN: All right, sir.

5 MR. MORIARTY: -- or the end of January if you
6 think it's necessary.

7 JUDGE GOODWIN: Early in the week or late in the
8 week? Any preference?

9 MR. DEAN: Could we have it later in the week,
10 Your Honor?

11 JUDGE GOODWIN: Sure. Mr. Moriarty is suggesting
12 if we go toward mid month, that would relieve him of the
13 conflict. I see Ms. Betts may be standing up ready to tell
14 me she's got a conflict later.

15 MS. BETTS: Well, I may have problems late in the
16 week because of other commitments.

17 JUDGE STANLEY: I was just trying to figure out
18 whether they wanted a Wednesday or Thursday or Friday. And
19 I couldn't tell if you were saying end of the first week or
20 end of the second week.

21 MR. MORIARTY: I'm sorry. I have a trial starting
22 February 1st that I anticipate might take two weeks. So, if
23 my schedule needs to be taken into account, that's my
24 problem.

25 JUDGE STANLEY: How likely is it that the trial

1 will take place?

2 MR. MORIARTY: Given the, given the problems I had
3 trying to start this case about three weeks ago, sitting
4 around a courthouse for two days, I think we're likely to go
5 because we're going to get spun with what we call a visiting
6 judge, which is a retired judge who has no criminal or other
7 docket to conflict with it. So, I think it's likely. But
8 we have other lawyers.

9 JUDGE GOODWIN: 9:00 Thursday, February 11th.

10 MR. DEAN: That's fine, Your Honor.

11 JUDGE GOODWIN: Is that all right?

12 Any other matters we need to take up or would be useful
13 for us to take up today?

14 MR. DEAN: Your Honor, could I just have a minute
15 with my colleagues before I respond to that?

16 THE COURT: Sure.

17 MR. BLIZZARD: Your Honor, --

18 JUDGE GOODWIN: Yes, sir.

19 MR. BLIZZARD: -- I have a quick question.

20 JUDGE GOODWIN: Yes, sir.

21 MR. BLIZZARD: I know in the past, status
22 conferences have been limited primarily to leadership of the
23 Plaintiffs' Steering Committee, but I'm feeling the burdens
24 or the pressures of being number one. So, I wonder if I
25 should plan on attending some of these chamber conferences

1 to make sure that I'm familiar with all the details of
2 what's going on.

3 THE COURT: We won't throw you out.

4 MR. BLIZZARD: Thank you, Your Honor.

5 JUDGE GOODWIN: I rely heavily on the structure as
6 it is. Nevertheless, if you want to come and sit in the
7 room, we'll be glad to have you, Mr. Blizzard.

8 Yes, sir.

9 MR. MORIARTY: Two things. At some point, maybe
10 at the next status conference, we could talk about the
11 frequency with which you think you might try cases so people
12 can plan their spring if these don't immediately result in
13 some overall resolution.

14 The other thing is, we wonder what happens to the
15 non-selected cases such as Gilmore and McCornack. Should we
16 continue discovery in those cases? Should we defer that
17 until some agreed upon later time?

18 THE COURT: Why don't you talk about that. The --
19 well, I'll let you talk about it. If you don't work it out,
20 I'll just decide it.

21 MR. MORIARTY: Okay.

22 JUDGE GOODWIN: Anything else?

23 MR. THOMPSON: Judge, I had seen that you had
24 addressed the discovery issues. I assume that you've
25 addressed that to the extent you want to today. You don't

1 want to hear any high-pitched whine from me. So, we'll just
2 consider it as though I have made it on the record.

3 JUDGE GOODWIN: Thank you, Mr. Thompson.

4 MR. DEAN: And as though defendants have
5 responded.

6 JUDGE GOODWIN: Vigorously. I understand.

7 All right. Anything further?

8 (No Response)

9 JUDGE GOODWIN: Thank you all for coming. I
10 particularly appreciate the input from the other lawyers
11 that had cases. And, as usual, I'm gratified to have such
12 fine counsel in this multi-district litigation. It makes my
13 life much easier.

14 I hope that you will appreciate the fact and not be put
15 off by the fact that I am decisive. You may not always
16 agree, but it will be -- we'll move -- we'll decide and move
17 on. Talk to you later. Thank you all.

18 (Proceedings concluded at 12:07 p.m.)

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1 I, Lisa A. Cook, Official Reporter of the United
2 States District Court for the Southern District of West
3 Virginia, do hereby certify that the foregoing is a true and
4 correct transcript, to the best of my ability, from the
5 record of proceedings in the above-entitled matter.

6

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8 s\Lisa A. Cook

November 30, 2009

9 Reporter

Date

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